

STATE OF MINNESOTA**DISTRICT COURT****COUNTY OF RAMSEY****SECOND JUDICIAL DISTRICT**

In Re the Matter of:

Court File No: 62-CV-18-4145

Michelle L. MacDonald,
MacDonald Law Firm, LLC,

Plaintiff,

v.

**DEFENDANTS' MEMORANDUM OF
LAW IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT**Michael Brodkorb individually and
doing business as
www.missinginminnesota.com,
Missing in Minnesota, LLC and
Jon and Mary Does,

Defendants.

INTRODUCTION

Plaintiff's Amended Complaint for Defamation claims that her reputation has been damaged by Defendant's reporting about her. She claims that Defendant maliciously and falsely stated that she was a person of interest in a criminal investigation; that Defendant posted an unflattering photograph of her falsely implying that she was a drunk, a criminal and mentally unbalanced; and that Defendant falsely reported that she had been convicted of driving under the influence. Defendant in fact made truthful reports about Plaintiff's conduct after a reasoned examination of the facts. The matters under inquiry were of legitimate public interest involving a public figure and matters of public concern.

This is a summary judgment motion seeking dismissal of the Amended Complaint for Defamation which is on file herein. At issue on this motion is whether there is a genuine issue of material fact for trial. An issue is not genuine unless a jury could return a verdict for Plaintiff. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.3d. 2d (1986). In public figure defamation cases, the plaintiff must come forward with evidence sufficient to “support a reasonable jury finding that the plaintiff has shown actual malice by clear and convincing evidence.” *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 503 (Minn. App. 1989); *Anderson v. Liberty Lobby*, 477 U.S. at 255-56.

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Issues Involved

1. Is there a genuine issue of fact as to whether Plaintiff is a public figure?
2. Is there a genuine issue of fact as to whether Plaintiff was a “person of interest” in the disappearance of two missing girls?
3. Is there a genuine issue os fact as to whether the published photograph of Plaintiff was a booking photo/mug shot?
4. Is there a genuine issue of fact as to whether Plaintiff was charged with DUI in 2013 and was found guilty of refusing to submit to a blood test.
5. Is there a genuine issue of fact as to whether Plaintiff was suspended from the practice of law in January of 2018?
6. Is there a genuine issue of fact as to whether defendant acted with actual malice?
7. Does Count 2 - Defamation by Implication - state a claim?

Documents Comprising the Record on which the motion is made

- § Affidavit of Michael Brodkorb
- § Exhibit “A” to Affidavit of Michael Brodkorb (Minnesota Supreme Court Decision in *In re Petition for Disciplinary Action against Michelle Lowney MacDonald*, No. A16-1282 (Minn. 01-17-2018)).
- § Exhibit “B” to Affidavit of Michael Brodkorb (August 3, 2016, article in www.MissinginMinnesota.com)
- § Exhibit “C” to affidavit of Michael Brodkorb (booking photo articles)
- § Exhibit “D” to affidavit of Michael Brodkorb (Minnesota Court of Appeals decision in *MacDonald Shimota v. Comm’r of Public Safety*)
- § Exhibit “E” to Affidavit of Michael Brodkorb (May 18, 2016, article in www.MissinginMinnesota.com)
- § Amended Complaint for Defamation

Statement of Undisputed Material Facts

- § Plaintiff was, at all relevant times, a public figure as a candidate for public office and a person who thrust herself into public controversy. [AFF. ¶17, Exh. “D”].
- § Plaintiff was identified as a person of interest in the disappearance of the two Ruchi children. [Aff. ¶4, 7].
- § Plaintiff was booked into the Dakota County jail, and the photograph published by Defendant as her booking photo was in fact her booking photo. [Aff. ¶ 11, Exh. “A”]
- § Plaintiff was stopped in 2013 and charged with driving under the influence, refused to take the Intoxilyzer test and resisting arrest. She was acquitted of the DUI charge but convicted of the charges of test refusal and resisting arrest. [Aff. ¶15, Exh. “E”].

ARGUMENT

To succeed on her defamation claim, Plaintiff has the burden of proving: (1) that Defendant made a false statement about her, (2) that Defendant published said statement to third persons, (3) that publication of the statement caused harm to her reputation; and (4) because she is a public figure, that Defendant acted with actual malice toward her. *Richie v. Paramount Pictures Corp.*, 544 N.W.2d 21, 25 (Minn. 1996); *McKee v. Laurion*, 825 N.W.2d 725, 729-30 (Minn. 2013); Plaintiff bears the burden of proving actual malice by clear and convincing evidence. *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 503 (Minn. App. 1989).

I. THERE ARE NO GENUINE FACT ISSUES PRECLUDING
JUDGMENT FOR DEFENDANT ON THE ISSUE OF
WHETHER HIS STATEMENTS REGARDING PLAINTIFF
WERE TRUE.

Truth is an absolute defense to a defamation claim. *Stempges v. Park Davis & Co.*, 297 N.W.2d 252, 255 (Minn. 1980); *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497, 500 (Minn. App. 1989). Plaintiff's complaint alleges that Defendant made three false statements: (1) that she was a "person of interest" in the disappearance of the Rucki children; (2) that a photograph of her was a booking photo or a mug shot; and (3) that she had been convicted of drunk driving. The actual statements made by Defendant

regarding these matters were all true.

Person of interest. Plaintiff's complaint asserts that Defendant identified her as a "person of interest" on October 22, 2015, and on August 3, 2016, in the investigation of the disappearance of two daughters in a child custody case. Defendant did so identify her, based upon information from the Lakeville police and upon reports published by other persons in the Star Tribune. [Aff., ¶4, 7]. It is an undisputed fact that Plaintiff was a "person of interest."

Use of the booking photo. Plaintiff claims that Defendant falsely labeled this photo as a mug shot or a booking photo. In fact, the photo is a booking photo of Plaintiff. [Aff., ¶11]. The photograph accurately portrays her when she was booked into the Dakota County jail. While the photograph is not flattering, it does not portray her as "drunk, criminal and mentally ill." Defendant has frequently utilized other photographs of her. There is no genuine issue of fact as to whether this photo was accurately referred to as booking photo.

Drunk Driving. On May 18, 2016, Defendant reported on Plaintiff's efforts to be endorsed as the Republican Party candidate for the Minnesota Supreme Court [Aff., ¶15, Exh. "D"). Defendant then stated:

After MacDonald was endorsed [in 2014], news broke that she was facing criminal charges for suspicion of drunk driving and resisting arrest.

* * *

In September 2014, MacDonald was found not guilty of drunk driving, but was found guilty of refusing to submit to breath testing, obstructing the legal process and speeding.

The above reporting is consistent with the Minnesota Court of Appeals report in

MacDonald Shimota v. Comm'r of Public Safety, No. A14-0618 (Minn. App. 05-04-2015 [unpublished, copy annexed as Exhibit “D” to Aff.]. There is no genuine issue of material fact regarding the truth of Defendant’s statements regarding this event. Truth is an absolute defense to this defamation claim, and to Plaintiff’s Count 2, which attempts to state a claim for defamation by implication, *Diesen v. Hessburg*, 455 N.W.2d 456 (Minn. 1990).

II. THERE ARE NO GENUINE FACT ISSUES PRECLUDING
JUDGMENT FOR DEFENDANT ON THE ISSUE OF
WHETHER PLAINTIFF IS A PUBLIC FIGURE.

A defamation plaintiff who is a public figure must establish that the defendant acted with actual malice in order to recover for defamation. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 87 S.Ct. 1975, 18 L.3d. 2d 1094 (1967), *Foley v. WCCO Television, Inc.*, 449 N.W.2d 497 (Minn. App. 1989). “[O]ne who volunteers himself as a candidate for public office becomes thereby a public figure...” *Klaus v. Minn. State Ethics Comm’n.*, 309 Minn. 430, 244 N.W.2d 672, 676 (Minn. 1976). In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272, 91 S.Ct. 621, 28L.3d2d 35 (1971), the Supreme Court explained:

[I]t is abundantly clear that... publications concerning candidates must be accorded at least as much protection under the first and Fourteenth Amendments as those concerning occupants of public office.

See also, *Jadwin v. Minneapolis Star and Tribune Co.*, 367 N.W.2d 476, 482 (Minn. 1985). In this case, Plaintiff has been a perennial candidate for office, running for the

Minnesota Supreme Court justice in 2014, 2016 and 2018. [Aff. ¶16, Exh. “E”].

In addition, Plaintiff affirmatively injected herself into the public interest controversy over the two missing children, going beyond her role as a lawyer to appear on the television news show 20/20 and to publish a book about the controversy. [Aff. ¶17].

III. THERE ARE NO GENUINE FACT ISSUES PRECLUDING
JUDGMENT FOR DEFENDANT ON THE ISSUE OF
WHETHER DEFENDANT ACTED WITH MALICE

To prove actual malice, the Plaintiff must show that Defendant made a defamatory statement with knowledge that it was false or with reckless disregard of whether it was false or not. *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). To show reckless disregard, “there must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts about the truth of his publication.” *Foley, supra*, 449 N.W.2d at 502, quoting *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262(1968). See also *Ducklow v. KSTP-TV, LLC*, 2014 WL802515, No. A13-1279 (Minn. App. 03-03-2014) [unpublished, copy annexed hereto as Exh. “F”]. Plaintiff cannot prevail on this issue unless she comes forward with clear and convincing evidence in admissible form sufficient to permit a jury to find actual malice. *Foley*, 449 N.W.2d at 503.

IV AS A MATTER OF LAW, THE COUNT FOR
DEFAMATION BY IMPLICATION DOES NOT STATE A
CLAIM.

Plaintiff's Count 2 complains that the website missinginminnesota.com creates the false implications that she is "involved in ongoing criminal activity, ongoing criminal investigation by police, a drunk, mentally ill..." As set forth above, there is no genuine issue of material fact as to whether the statements in question are true. The issue raised by this Count is whether the inferences Plaintiff would draw from these true statements create defamation.

In *Diesen v. Hessburg*, 455 N.W.2d 556, 451 (Minn. 1990), cert. denied, 498 U.S. 1119, 111 S.Ct. 1071, 1072 (1991), the court agreed with the Eighth Circuit and refused to recognize defamation by implication:

In a recent decision, the Eighth Circuit held, "We do not recognize defamation by implication," in affirming summary judgment against a public figure. *Price v. Viking Penguin, Inc.*, 881 F.2d 1426, 1432 (8th Cir.1989) (citing *Janklow*, 788 F.2d at 1304), cert. denied, --- U.S. ----, 110 S.Ct. 757, 107 L.Ed.2d 774 (1990); accord *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1016-17 (1st Cir.), cert. denied, --- U.S. ----, 109 S.Ct. 65, 102 L.Ed.2d 42 (1988). An FBI agent in *Price* sued a media defendant for allegedly defamatory statements and implications contained in a book, but was not allowed to recover largely because the challenged assertions of improper motive were protected opinion under the *Janklow* totality of the circumstances analysis. 881 F.2d at 1432. Other jurisdictions have also specifically declined to allow a public official to prove falsity by implication where the challenged statements are true. See, e.g., *Cibenko v. Worth Publishers, Inc.*, 510 F.Supp. 761, 765 (D.N.J.1981); *Pietrafesa v. D.P.I., Inc.*, 757 P.2d 1113, 1115-16 (Colo.Ct.App.1988); *Strada*, 193 Conn. at 326, 477 A.2d at 1012; *Schaefer v. Lynch*, 406 So.2d 185, 188 (La.1981). We concur, believing the subject articles fall within the protected purview as described by the *Janklow* court.

If anyone want to infer anything from the true statement that Plaintiff was a person of interest in the disappearance of the Rucki children it is their right to have an opinion. However, publication of this, and other, true statements, cannot be the basis of a defamation claim.

CONCLUSION

There are no genuine issues of material fact precluding dismissal of the Amended Complaint for Defamation, and Defendant respectfully requests the order of this court dismissing it.

Dated: October 1, 2018

Respectfully submitted,

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